No. 93-517

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

On Writ of Certiorari
To The New York Court Of Appeals

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE NATIONAL ASSOCIATION OF EVANGELICALS, SOUTHERN CENTER FOR LAW & ETHICS, AND FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT GOVERNMENTAL ACCOMMODATION OF RELIGION UNLESS IT ACCORDS RELIGIOUS INSTITUTIONS OR ACTIVITIES PREFERENTIAL TREATMENT OVER NONRELIGIOUS ALTERNATIVES IN A WAY THAT INDUCES OR FAVORS RELIGIOUS EXERCISE

Nothing so reveals the quality of a nation's commitment to liberty of mind and conscience as its treatment of small minority religious sects within its midst – especially those whose practices and convictions diverge most sharply from the mainstream. Last Term, this Court unanimously voted to invalidate a local ordinance passed for the purpose of suppressing the worship of one such sect. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2227 (1993). In the present case, the State of New York has gone out of its way to structure the delivery of secular educational services so as to respect and protect

the way of life of another such group. One might expect that such an action would be hailed as an exemplar of pluralism, diversity, and toleration in action. Instead, the courts below held it to violate the First Amendment of the United States Constitution.

The holding of the New York Court Of Appeals can only be described as Orwellian. The Establishment Clause, which ought to limit the government's power to enforce conformity to the majority's vision of the proper religious life, has been pressed into service to *frustrate* New York's efforts to enable the Satmar Hasidic sect of Kiryas Joel to avoid conformity to the majority's way of life. The First Amendment, which ought to serve as a bulwark against enforced assimilation and homogenization, is turned into its opposite.

The purpose of this brief is not just to urge reversal of this palpably intolerant and erroneous ruling. It is to point out that the decision below is all too typical of the upside-down logic of many lower court interpretations of the Establishment Clause, and that these misinterpretations have their origin in ambiguities in this Court's most often cited "test" for an Establishment Clause violation: *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Our purpose is not to attack the fundamental theory or structure of the *Lemon* test, but to propose a clarification that would avoid misinterpretations such as that exemplified by the decision below.

In this brief, we will focus on the second part of the test, the so-called "effects" prong, on which the Court of Appeals relied. The primary conceptual problem with the "effects" test as it is now articulated is its failure to

distinguish between programs that "advance religion" in the sense of creating incentives or inducements to exercise religion, and those that "advance religion" in the sense of allowing individuals and groups a greater latitude to decide for themselves whether, and in what manner, to exercise religion. When the state facilitates the independent religious decisions of individuals or communities, it should be deemed not to violate the Establishment Clause – even though those individuals or communities may exercise their freedom in a way that advances religion.

The primary effects test of *Lemon* should be clarified as follows: a government action challenged under the Establishment Clause does not have the "primary effect" of "advancing religion" unless it accords religious institutions or activities preferential treatment over nonreligious activities in a way that induces religious exercise, rather than removing a barrier to independent religious decisions of individuals or groups. *Conversely, government action avoids such inducement or favoritism for religion, and thus comports with the Establishment Clause, when it "reasonably" may be seen as removing a "significant" deterrent to the free exercise of religion, and does not impose "substantial burdens on nonbeneficiaries" that are disproportional to the burdens on free exercise that it relieves. Texas Monthly v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion of Brennan, J.).

In justifying and explaining this proposal, *amici* will base our analysis principally on two recent decisions of this Court, one upholding an exemption targeted exclusively toward religion (*Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987)) and one striking down such an

exemption (*Texas Monthly, supra*). We urge the Court to adopt explicitly the framework proposed in Justice Brennan's plurality opinion in *Texas Monthly* for evaluating the legitimacy of governmental accommodation of religion.[1] We recognize that only three Justices joined Justice Brennan's plurality opinion in *Texas Monthly* and that the other Justices in that case were prepared to take a more expansive view of accommodation. *See id.* at 26-29 (Blackmun, J., concurring); *id.* at 30-44 (Scalia, J., dissenting); however, we consider that to be a strength rather than a weakness. We would rather have this Court build from the cautious approach of Justice Brennan than to allow the lower courts to continue to grope in uncertainty.

Since the *Lemon* question has been so fraught with misunderstanding on all sides, *amici* wish to make clear that we do not criticize the three-part test because we believe that the government should have greater discretion to foster or encourage favored forms of religious practice. On the contrary, these *amici* are committed to the proposition that the use of government power to advantage any particular view of religion (for or against) is injurious to true religion as well as to the American constitutional order. We thus respect the motives of those on and off the Court who have adhered to *Lemon* as a means of cabining government power over religion. But

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[1] This is not to say that each of the *amici* subscribes to the result in *Texas Monthly*. Our disagreement, however, is not with the framework itself but with its application in that case – particularly with the conclusion that taxation of the sale of Bibles and other religious literature would not impose a significant burden on religious exercise so as to justify a legislatively granted tax exemption (*see* 489 U.S. at 18 n.8).

as this case plainly demonstrates, *Lemon* is a deeply flawed test for achieving that worthy objective. Unless modified or redefined, the *Lemon* test will continue to produce unnecessary and destructive conflicts between the Establishment Clause and government efforts to accommodate or facilitate the free exercise of religion.

A. The Action Of the New York Legislature Can Be Defended, Without Reaching the Accommodation Issue, On The Ground That It Extends to the Children of Kiryas Joel Benefits No Greater Than Would Be Provided To Other Children With Similar Needs.

Under our proposed reformulation of the effects test, challenged government action claimed to be an unconstitutional benefit to religion may be defended on either of two grounds: (1) that the challenged action is formally neutral toward religion (or "religion-blind"), *i.e.*, that it does not constitute preferential treatment for religious over nonreligious institutions or activities; or (2) that its purpose and effect is to accommodate, and not to induce or favor, the exercise of religion. *See Texas Monthly*, 489 U.S. at 14-15. Justice Brennan articulated the first half of this proposition as follows:

> "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." *Texas Monthly*, 489 U.S. at 14-15 (footnote omitted).

This is consistent with a long line of precedents in this Court, including most recently *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993); *see also Board of Education v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Everson v. Board of Education*, 330 U.S. 1 (1947). Justice Powell stated in *Witters v. Washington Department of Services*, 474 U.S. 481, 490-491 (1986), that if a government program is "wholly neutral in offering . . . assistance to a class defined without reference to religion," it should withstand Establishment Clause scrutiny.[2]

The governmental act under challenge in this case satisfies that standard. The legislature simply recognized that the Monroe-Woodbury School District had refused to meet the distinctive emotional, cultural, and linguistic needs of a particular group of disabled children, and created a smaller district that would be more responsive to their needs and would resolve the conflict without cost or injury to anyone else. There is no reason to believe that the State of New York would be any less willing to help any other identifiable group of needy children (for example, a different language minority) if their school district were similarly uncooperative. Indeed, the principal reason why municipal political jurisdictions are subdivided is in order to cure actual or perceived unresponsiveness to a minority living within a separable part of the larger unit. *See, e.g., City of New York v. State of New York*, 561 N.Y.S. 2d 154, 76 N.Y. 2d 479, 562 N.E. 2d 118 (1990)

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[2] Justice Powell's concurring opinion in *Witters* was endorsed by five of the nine Justices. *See* 474 U.S. at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring).

(upholding procedure for creation of a separate city of Staten Island out of the present City of New York).[3] The State need not know, or care, about the children's religious beliefs; all it needs to know is that the disabled children of Kiryas Joel need to receive special education within their own neighborhood because forcing them to travel to a different community with different language, customs, and mores is so traumatic and unsettling that they are unable to profit by the special education. The State is not forbidden to make educationally sensible arrangements merely because the beneficiaries are religious children. *Zobrest*, 113 S. Ct. at 2466.[4]

The court below rejected the argument that Chapter 748 is a means for securing the neutral extension of benefits to the children of Kiryas Joel. It stated that "the

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[3] It is important to note in this respect that the special school district simply follows the lines of an already existing village (incorporated in 1977), whose validity is not challenged in this case. The district therefore is not subject to the sort of objections raised in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), which applied strict scrutiny to certain voting districts that fail to satisfy "traditional districting principles" such as "provid[ing] for compact districts of contiguous territory, or [maintaining] the integrity of political subdivisions." *Id.* at 2826. Unlike the racial gerrymander involved in *Shaw*, this is among those cases where " 'residential patterns afford the opportunity of creating districts in which [a given racial or religious group] will be in the majority.' " *Id.* at 2829 (quoting *United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977) (plurality opinion per White, J.)).

[4] This Court should be particularly hesitant to interfere with this type of exercise of state authority, for the power to combine, divide, merge, and dissolve subordinate political districts is at the heart of state sovereignty. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

statute creating a school district and establishing a board of education cannot be viewed as part of a general government program. Rather, . . . the statute represents an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect." Pet. App. 14a. This is a *non sequitur*. The fact that the population of Kiryas Joel "are all members of the same religious sect" does not refute the possibility that the purpose of Chapter 748 was to ensure that the children of Kiryas Joel are able to benefit from a "general government program," and the fact that there was a "longstanding conflict" between the parents of Kiryas Joel and the Monroe-Woodbury School District does not mean that the legislature's intervention was an act of preferential treatment. Only if we assume that the State of New York would turn a blind eye to nonreligious children with similar needs does Chapter 748 constitute preferential treatment on account of religion. A court must not *presume*, in the absence of evidence, that the legislature would behave in a discriminatory fashion. *Hernandez v. Commissioner*, 490 U.S. 680, 701-703 (1989). Since the plaintiffs here presented no evidence that the State of New York *failed* to provide comparable arrangements for similarly situated, but nonreligious, children in the State, the courts below should have issued summary judgment in favor of the defendants.

B. The Action Of the New York Legislature Was A Legitimate Accommodation Of Religion.

The action of the New York legislature is equally legitimate if we accept the assumption of the court below that creation of the Kiryas Joel school district was expressly and deliberately based upon the religious character of the community. As Justice Brennan has explained, "government [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in judgment). The key difference between a legitimate accommodation and an impermissible "establishment" is that the former merely removes obstacles to a religious practice or conviction that was adopted independently of the government action, while the latter creates an incentive or an inducement (in the strongest form a compulsion) to adopt that practice or conviction.

In this section we will demonstrate: (1) that the concept of permissible accommodation of religion is an accepted part of Establishment Clause jurisprudence; (2) that the lower court's interpretation of the *Lemon* test precludes the possibility of accommodation and should be corrected by this Court; and (3) that the creation of a separate school district in Kiryas Joel satisfies a more precise test for permissible accommodation that can be distilled from recent precedents.

1. The Concept of Permissible Accommodation of Religion Is An Accepted Part of Establishment Clause Jurisprudence

This Court has repeatedly recognized that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987).[5] In *Corporation of Presiding Bishop v. Amos, supra* 483 U.S. 327, the Court upheld Title VII's exemption of religious institutions from strictures against religious discrimination, stating that "there is ample room for accommodation of religion under the Establishment Clause." And in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court, upholding a program of releasing students from public schools for outside religious instruction, stated that government may "respect[ ] the religious nature of our people and accommodate[ ] the public services to their spiritual needs." *Id.* at 314.

Accommodations of religion are appropriate because even ostensibly "neutral" laws and government practices – reflecting, as they do, the perspectives of the majority –

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[5] *See also, e.g., Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (endorsing "leaving accommodation to the political process" through "nondiscriminatory religious-practice exemption[s]"); *Gillette v. United States*, 401 U.S. 437 (1971) (upholding exemptions from military draft for religious conscientious objectors to all wars); *Texas Monthly*, 489 U.S. at 18 n.8, 19 (plurality opinion per Brennan, J.); *Lukumi*, 113 S. Ct. at 2241-2242 (Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 82-83 (1985) (O'Connor, J., concurring).

sometimes come into conflict with the tenets and practices of one or more of the religious faiths of America. To the extent we are concerned with neutrality of *effect* – with guaranteeing that government action has the least possible effect on the religious beliefs and practices of the people, consistent with achievement of secular governmental ends[6] – it is not sufficient for government to ignore the effect of its actions (such as forcing disabled children to travel to other communities to receive special education services) on religious practice.

Accommodations may be divided into two categories: "constitutionally compelled" accommodations (those required as of right by the Free Exercise Clause) and "legislative" or "permissible" accommodations (those not required by the Free Exercise Clause but nonetheless permitted by the Establishment Clause). In *Employment Division v. Smith*, the Court narrowed (if it did not eliminate) the category of constitutionally compelled exemptions, but it in no way suggested that legislative accommodations are constitutionally disfavored. On the contrary, the Court stated that "nondiscriminatory religious-practice exemption[s]" are "permitted, or even . . . desirable." 494 U.S. at 890. And in *Texas Monthly*, Justice Brennan expressly rejected the notion that accommodations are not permissible under the Establishment Clause unless they are compelled by the Free Exercise Clause. 489 U.S. at 18 n.8. *See also Walz*, 397 U.S. at 673 (1970).

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[6] *See* Laycock, D., *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) (cited in *Lukumi*, 113 S. Ct. at 2241-2242 (Souter, J. concurring)).

The legitimacy of accommodations of religion is solidly grounded in the historical background of the First Amendment. The laws of almost every state in the years before and after 1789 contained special exceptions or accommodations for religious minorities who could not conscientiously comply with the law. The most common examples were exemptions from oaths, tithing, and military conscription requirements. The Continental Congress voted to exempt religious pacifists from military service or contributions, and James Madison – following the lead of the ratifying conventions of North Carolina, Virginia, and Rhode Island – proposed that such an exemption (for those "religiously scrupulous of bearing arms") be made part of the Bill of Rights. Madison's proposal was narrowly defeated, but the principal opponents took the position that such exemptions should be left to the discretion of the legislature. There was no significant body of opinion that such exemptions would improperly "endorse," "promote," or "establish" religion.[7] George Washington aptly expressed the spirit of the day in his

[7] The historical evidence summarized in this paragraph is discussed in detail, with citations to the original materials, in an article by one of the authors of this brief. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73, 1500-03 (1990). We wish to stress that here we are relying on the author's uncontested conclusion that religious accommodations were *permitted*. Even scholars who assert on historical grounds that religious accommodations were not *required* have agreed that they were not thought illegitimate at the time of the framing. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 916-917 (1992); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J. L. Ethics & Pub. Pol. 591, 635 (1990).

letter to Quaker citizens who had enjoyed exemption from contributing to "the burthen of common defense":

> I assure you very explicitly. that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

30 *Writings of George Washington* 416 n.54 (John Fitzpatrick ed. 1939).

2. Elements of the *Lemon v. Kurtzman* Analysis, As Applied by the State Courts in This Case, Would Eviscerate the Doctrine of Accommodation of Religion

Notwithstanding precedent in this Court going back to *Zorach* and historical support going back to the days of Madison and Washington, there has not yet been a majority opinion from the Court clearly setting forth the principles under which accommodations of religion are to be judged. Worse yet, the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), usually the "effects" prong, is frequently misinterpreted by the lower courts as forbidding religious accommodations. The decision below is an all-too-typical example.

The Court of Appeals held that "the principal or primary effect of Chapter 748 . . . is to advance religious beliefs" and that the statute thus violated the second prong of the three-part test of *Lemon*. Pet. App. 12a. The rationales that the court offered would apply across the

board to any conceivable legislative accommodation of religion.

The Court of Appeals' first conclusion was that the statute "authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community" Pet. App. 12a. The court explained that the "primary effect of Chapter 748 is . . . to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices." Pet. App. 15a.

This rationale would invalidate most if not all government accommodations of religion. The very nature of accommodation is for the government to "yield" to the religious needs of an individual or group whose tenets are in "tension" with the government's regulatory interests. The very nature of accommodating a religious individual or group is to allow the religious interest "to dictate" the reaches of government policy with respect to the individual or group.

For example, the accommodation required in *Sherbert v. Verner*, 374 U.S. 398 (1963),[8] could be recharacterized, under the Court of Appeals' reasoning, as "yield[ing] to the demands" of the religious claimant for jobless benefits and "authorizing [her] to dictate" what sort of work she will accept in lieu of such benefits. Following the same reasoning, the exemption of religious institutions from Title VII liability for religious discrimination upheld

[8] *Sherbert* was distinguished but not overruled in *Smith*, 494 U.S. at 884.

in *Amos*, could be said to make the statutory policy of nondiscrimination "yield" in the face of a church's desire to favor adherents of its own faith. Or the congressional decision to permit Jewish servicemen to wear yarmulkes with their military uniforms, approved by this Court in dictum in *Texas Monthly* (489 U.S. at 18 n.8), could be said to "yield" to the "dictates" of Jewish servicemen.

A similar difficulty is presented by the Court of Appeals' holding that the establishment of the Kiryas Joel school district creates a "symbolic union of church and state," Pet. App. 12a, and so violates the "effects" prong. The notion of a "symbolic union" appears in a number of cases applying the *Lemon* test. *See, e.g., Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389-392 (1985); *Larkin v. Grendel's Den*, 459 U.S. 116, 125-126 (1982). Yet the abstract notion of a "symbolic union" provides no useful guidance for distinguishing permissible from impermissible actions toward religion. Once again, almost any benefit conferred upon religion could be characterized as creating a "symbolic connection" between church and state. *See Bowen v. Kendrick*, 487 U.S. 589, 613 (1988) (holding that assertion of "symbolic link" cuts too broadly by potentially invalidating any funding of religious organizations, even for secular purposes); *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting) (arguing that majority's "abstract theories" of symbolic state support for religion "dissolve in the face of experience" of Title I remedial aid program). The notion of a "symbolic union" is simply too subjective to serve as a constitutional standard and should be repudiated as such.

The lower court's principal basis for invalidating accommodations of religion is that they "convey[] a

message of governmental endorsement of religion." Pet. App. 15a. This impression is entirely in the eye of the beholder. To one acquainted with this nation's commitment to religious freedom and diversity, an accommodation of religion is an "endorsement" of religious pluralism and mutual respect – not of a dominant or favored religion. *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring); *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992) (Souter, J., concurring). The lower court's notion that the Satmar Hasidim will perceive Chapter 748 "as an endorsement of their religious choices" and that "nonadherents" will perceive it as "disapproval . . . of their individual religious choices," Pet. App. 12a is, with all respect, wholly ungrounded. No one could seriously maintain that this tiny sect has managed to wrest this kind of "endorsement" from the legislature, or that the other 99.999% of the New York population has suffered so amazing an indignity at the hands of the democratic process. The obvious "message" conveyed by this action is one of respect for a minority religious group whose way of life was threatened by the uncooperative stance of the majority-dominated local school board.

The analysis of the court below is not easily reconciled with this Court's Establishment Clause cases, but the breadth and vagueness of the concept of "advancing religion" permits – even invites – lower courts hostile to religious accommodations to invoke various abstractions and speculations as a rationale for striking them down. Until this Court clarifies what is meant by the second

prong of *Lemon*, decisions like the one below will continue to obstruct legitimate accommodations of religion.[9]

3. Chapter 748 Should Be Upheld Under Recent Decisions By this Court, Which Establish A Workable Framework For Defining Permissible Accommodations of Religion

In *Wallace v. Jaffree*, 472 U.S. at 82, Justice O'Connor commented that the "challenge" is to "define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion," which would not open the door to "[a]ny statute pertaining to religion." In the years since *Jaffree*, and particularly in *Amos* and *Texas Monthly*, we believe that such a definition of limits has developed. It has three elements:

- **The effect on beneficiaries:** does the government's action lift an identifiable burden on the exercise of religion, or does it create an inducement or incentive to engage in that practice as opposed to nonreligious alternatives?

- **The effect on nonbeneficiaries:** is the burden on nonbeneficiaries so disproportional

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[9] Although the Court reduced the range of constitutionally compelled exemptions in *Smith*, Congress has now (by overwhelming majorities) directed that religion-specified accommodations be available as a matter of statutory right. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (signed into law November 16, 1993). The approach of the state courts in this case would put the Establishment Clause on a collision course with Congress's directive in a wide variety of cases.

to the accommodative effect that the measure must be seen as favoritism for religion?

- **The treatment of other religions:** has the government denied comparable accommodation to the same or closely analogous needs of other religions, without a secular, objective basis for the difference in treatment?

As we understand the analysis in *Texas Monthly* and other cases, these are not "factors" to be "balanced," but separate analytical points, each of which must be satisfied if an ostensible accommodation of religion is to be sustained.

a. The effect on beneficiaries

The first and most important step is to ask whether the challenged governmental action is designed to lift an identifiable burden on the practice of religion. In the words of then-Associate Justice Rehnquist, "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause." *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting). *See also Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (distinguishing between official legislative prayers and prayers that would "accommodat[e] individual religious interests").

This does *not* mean that accommodations are limited to those required by the Free Exercise Clause. *Texas Monthly*, 489 U.S. at 18 n.8; *Amos*, 483 U.S. at 336 (upholding religious exemption even on the assumption that it went beyond what the Free Exercise Clause requires); *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439, 454 (1988) (finding that religious practitioners were not "burdened" in the constitutional sense by the government's challenged action, but adding that this "need not and should not discourage [the government] from accommodating religious practices like those engaged in by the [plaintiffs]"). It is sufficient that the challenged action may "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Texas Monthly*, 489 U.S. at 15; *see id.* at 18 n.8 (asking whether the statute is "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause"); *Lee v. Weisman*, 112 S. Ct. at 2677 (Souter, J., concurring) ("accommodation must lift a discernible burden on the free exercise of religion").[10]

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[10] Some of these quotations suggest that burdens on religious exercise imposed by *private* parties would not justify a governmental effort at accommodation. We would urge the Court not to adopt such a limitation on discretionary accommodation: at least where government protects secular concerns against harm from private parties, it should be free to afford similar protection to religious concerns. For example, the Title VII provision requiring employers to make "reasonable accommodation" to the religious needs of their employees obviously does not remove a *state*-imposed burden; yet such accommodations are widely assumed to be legitimate. *See Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). The point is not raised in this

There is no doubt that Chapter 748 removes a "demonstrated and possibly grave imposition" on the religious identity and customs of the people of Kiryas Joel. *See Texas Monthly*, 489 U.S. at 18 n.8, 19. To be sure, the Satmar Hasidim do not have a specific religious tenet requiring them to remain apart from others. Rather, their distinctive religious life entails separation *as a practical matter* and would be endangered if they were forced to participate extensively in institutions with sharply divergent values, mores, and beliefs. In this sense, the parents' free exercise interests are analogous to those of the Old Order Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), who also sought to protect their children from "worldly influences in terms of attitudes, goals, and values." *Id.* at 218.[11] This Court properly held that the Amish have a constitutional right to avoid forcible "assimilation into society at large." *Id.* This is more than protection for specific tenets: it is protection for a way of life.

The New York legislature perceived that the religious way of life of the Satmar Hasidim is threatened by enforced amalgamation into an "ordinary," modern, secular, English-speaking school. It saw that the Monroe-Woodbury School District had refused to provide special education at a neutral site within the village, and that this put the Satmar parents to a cruel choice: they could either send their disabled children to alien schools, where they

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case: the burden on religion here (which is caused by the operation of public schools antithetical to the Satmar way of life) obviously stems from state action.

[11] *Yoder* remains good law even after *Employment Division v. Smith*. *See Smith*, 494 U.S. at 881.

would be assimilated to the wider culture and at the same time be so traumatized by the experience that the children would not profit by the special education; or they could forfeit desperately needed special education services for their children (perhaps leaving them with no education at all, since the private schools within Kiryas Joel were not equipped to meet their special requirements). Either way, the Monroe-Woodbury School Board's refusal to provide services in the village imposed a serious burden on the exercise of the Satmar religion.

There is no plausible claim that the formation of the Kiryas Joel school district created an inducement to practice the religion of Satmar Hasidism, or religion in general. The record (to the extent it is relevant to this facial challenge) shows that the school operated by the Kiryas Joel district is entirely secular, with teachers and administrators who are not Village residents, a superintendent who is not Hasidic, and a curriculum that is exclusively secular; thus, the school cannot possibly serve to inculcate a religious faith. (Should operation of the school change in this respect, plaintiffs will be free to bring an "as applied" challenge to the offensive practices.) The benefits available to a member of the Satmar sect are neither greater nor lesser than those available to anyone else. The effect of the state's action on the decision to practice this (or any) religion is entirely neutral – more neutral, indeed, than was the *status quo ante*, where a valuable benefit was provided only to those willing to subject their children to an assimilative educational experience. Accordingly, the enactment of Chapter 748 easily satisfies the first element in the constitutional test applicable to accommodations of religion.

b. Effects on Non-Beneficiaries

The second question under the analysis of the *Texas Monthly* plurality is whether the burdens imposed on "non-beneficiaries" as a result of the challenged governmental action are disproportional to the burden on free exercise relieved by the action. *See* 489 U.S. at 15, 18 n.8. This does not mean that an accommodation of religion may not impose *any* significant burden on non-beneficiaries, but only that the legislature must have reasonably balanced the burdens and not made the religious interest a trump. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (striking down religious accommodation on the ground that it was "absolute and unqualified"). Obviously, the military draft exemption upheld in *Gillette* imposes a significant cost on those not exempted – a higher probability of being required to fight and perhaps die in war. Similarly, in *Amos*, the Title VII exemption "had some adverse effect" on employees of religious organizations, but – as was explained in *Texas Monthly* – this was permissible since it "prevented potentially severe encroachments on protected religious freedoms." *Texas Monthly*, 489 U.S. at 18 n.8. By contrast, if the government action imposes substantial costs on others while removing only a minimal burden from religion, this indicates that the government is "abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335.

In applying this weighing of the burdens, courts should give reasonable leeway to the judgment of the legislature. At least since 1937 this Court has recognized

that the legislature has broad latitude to adjust the benefits and burdens of social and economic life. So long as the burden imposed on others is not of a nature that infringes their ability to exercise *their* religion, the accommodation should not be condemned unless the burden is clearly disproportionate. If the government may impose burdens on others in service of constitutional values such as equality, fair trial, or free speech, there is no reason to be unduly suspicious when the value to be served is that of religious freedom. As this Court has observed, "there is ample room for accommodation of religion under the Establishment Clause." *Amos*, 483 U.S. at 338.

Respondents have not shown any "substantial burden on non-beneficiaries." Indeed, they have shown no injury at all. This case involves a solution that helps some people and hurts no one. Respondents' case is based entirely on an abstraction encouraged by the use of vague terms such as "advancement of religion" and "symbolic union of church and state." Indeed, were it not for the oddities of standing law under the Establishment Clause (*see Flast v. Cohen*, 392 U.S. 83 (1968)), respondents, lacking any cognizable injury, would not be permitted to interfere in an arrangement that suits the interests of all parties involved: the State, the parents, and even the Monroe-Woodbury School District, which supported enactment of Chapter 748.

c. Treatment of other religions.

Finally, although the issue is not raised in either *Amos* or *Texas Monthly*, it is well settled that religious accommodations must not favor one religion over others.

Equality among religious denominations is at the core of both free exercise and establishment principles. *Larson v. Valente*, 456 U.S. 228 (1982)); *see also Smith*, 494 U.S. at 890 (endorsing "nondiscriminatory religious-practice exemption[s]"). This does not mean that accommodations are unconstitutional whenever they may apply to one particular religious practice. Most accommodations are of this sort (exemptions for religious use of peyote, exemptions from jury service, exemption from the military's no-headgear rule, exemption from participation in Social Security on the part of self-employed persons, exemption from the Volstead Act for sacramental wine, exemption from Sunday Closing laws). Typically, exemptions are built into statutes when members of an affected faith go to the legislature and point out the need for accommodation. That is why accommodations tend to be narrow and specific. (An exception to this tendency is the Religious Freedom Restoration Act, Pub. L. 103-141, a legislative exemption writ large.)

The prohibition on denominational discrimination means, rather, that any failure by the government to provide comparable accommodation to the same or closely analogous religious practice when requested by others must be justified by a secular, objective governmental interest. *See, e.g., Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (permitting prisons to provide unequal facilities for religious worship when the difference is attributable to "the extent of the demand"); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991) (upholding federal regulations permitting use of peyote by Native American Church but not by other religions on the basis of the federal government's role as protector of the

Native American heritage). In *Gillette v. United States*, 401 U.S. 437 (1971), the decision most directly addressing this issue, the Court upheld a law exempting religious conscientious objectors from all wars (such as Quakers or Mennonites), but not objectors from particular wars (such as believers in just war doctrine). The question, according to the Court, was whether the government had "neutral, secular reasons," not based on religious favoritism, for its actions. *Id.* at 458.

There is no claim of denominational discrimination in this case and respondents, who are not members of a denomination claiming discrimination, lack standing to bring such a claim. (Their standing is as taxpayers only, and the amount of tax they pay is not affected by any alleged discrimination of this sort.) So far as we are aware, there is no other religious group facing a similar situation in New York, and we have no reason to believe that the New York legislature would be less accommodative to them if there were. Courts may not strike down otherwise constitutional accommodations of religion on the basis of speculation about what might happen to hypothetical parties not before the court. It is time enough to raise this issue if a similarly situated religious group claims discriminatory treatment – and even then, under standard severability doctrines, the proper result might well be to extend a similar accommodation to them rather than to strike down this one.[12]

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[12] For these reasons, the Court should reject the proposal made in Judge Kaye's concurrence in the Court of Appeals that a law accommodating a particular religious group be struck down unless it is "narrowly tailored to a compelling

C. This Reformulation Of the *Lemon* Test Would Be Consistent With Both the "Endorsement" and "Coercion" Tests Proposed As Alternatives By Members Of This Court

As this case shows, a critical defect in current formulations of *Lemon* is their reliance on ambiguous labels and slogans – "advancement of religion," "symbolic union of church and state" – which obscure rather than focus analysis. The problem is not so much that the *Lemon* test is *wrong* ("too strict," "not strict enough") but that the test is *amorphous* or *ambiguous* and thus allows (even invites) lower courts to reach wildly divergent results on similar facts.[13] We therefore suggest that these standards be replaced with ones that more precisely capture the interests at stake. We do not propose that the *Lemon* test be jettisoned in its entirety. *Lemon*'s focus on the purpose and effect of legislation remains useful, provided that each prong is clarified to redirect the courts' inquiry more precisely at forbidding governmental inducements of religion while permitting the government to "advance religion" in the sense of facilitating religious decisions arrived at independently.

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governmental interest." Pet. App. at 22a (quoting *Lukumi*, 113 S. Ct. 2217). Such strict scrutiny would be fatal to many worthy accommodations, such as those in *Gillette* and *Cruz*. It would be a terrible thing if the government were barred from accommodating any faith if it were not able to accommodate all faiths without substantial injury to its legitimate secular interests.

[13] Even this Court has found it difficult to apply *Lemon* in a convincingly consistent fashion. The school aid cases are the most prominent examples of the problem. For a catalog of the conflicting results, *see Wallace v. Jaffree*, 472 U.S. at 110-112 (Rehnquist, J., dissenting).

We suspect that *Lemon* has been retained for so long in its present form not because of its merits, but because no single alternative has been able to command a majority of the Court. In recent years, members of this Court have proposed two prominent alternatives to the *Lemon* test: the "endorsement" test and the "coercion" test. In application, these alternative tests may not be as far apart as they may appear in theory.[14] Our proposed reformulation provides a means of reconciling these two tests in the course of making the *Lemon* test less ambiguous.

The purpose of the coercion test is to ensure that the power of the government is not deployed to force or induce religious belief or behavior. *See County of Allegheny v. ACLU*, 492 U.S. 573, 659-663 (1989) (Kennedy, J., concurring in part); *Lee v. Weisman*, 112 S. Ct. 2649. This does not mean, however, that the Establishment Clause is limited to "direct coercion" (*Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part). To be objectionable under the "coercion" test, government action must constitute official pressure on the individual to conform. *See Lee v. Weisman, supra*.

Under our proposal, a challenged government action does not have the "primary effect" of "advancing religion" unless it accords religious institutions or activities preferential treatment over nonreligious activities in a way that would induce or favor religious exercise. We submit that governmental "inducement" or "favoritism"

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[14] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 162-165 (1992).

of religion is precisely what Justice Kennedy's "coercion test" means by "indirect coercion."

The school district of Kiryas Joel, which operates on a wholly secular basis, creates no pressure or inducement to participate in religious practices. Indeed, the only true coercive impact with respect to religion in this case came from the Monroe-Woodbury School District's insistence that the children of Kiryas Joel "forfeit [their] rights and benefits" to necessary special education services "as the price of resisting conformity" to the atmosphere and practices of the public schools. *Weisman*, 112 S. Ct. 2649, 2660.

Our proposed reformulation is equally compatible with the "endorsement" test. The purpose of this test is to "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring). Under our approach, challenged government action is unconstitutional only if it accords religious institutions or activities preferential treatment over nonreligious activities (and does not satisfy the requirements for permissible accommodation). If it is not preferential, it cannot possibly convey the message that the religious belief involved is "favored or preferred." To focus on actual preferential treatment, as opposed to the often subjective reactions of the observer regarding endorsement or favoritism, would make the approach more "capable of consistent application to the relevant problems." *Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring) (citation deleted). *See Board of Education v. Mergens*, 496 U.S. 226, 249-251 (1990) (using objective fact of equal treatment to refute subjective claim that students

would perceive the presence of religious groups on a public school campus as an endorsement of religion).

The endorsement test is entirely consistent with our theory of accommodation of religion, as long as a law is not understood to "endorse" religion whenever it regards the independent religious decisions of individuals and groups as worthy of special protection. *See Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). As Justice Souter has pointed out, the typical accommodation statute (for example, an exemption from drug laws for sacramental use of peyote) "conveys no endorsement of peyote rituals, the [Native American] Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans." *Lee v. Weisman*, 112 S. Ct. at 2677 (Souter, J., concurring). As long as a law accommodates and does not induce or favor religion, it conveys no endorsement. *Jaffree*, 472 U.S. at 82-83 (O'Connor, J., concurring).

When the government "pursues Free Exercise values," an "objective observer" would not conclude that there as been an endorsement of a religion. *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). The observer would, instead, recognize that Chapter 748, by protecting a small and historically victimized religious group from unnecessary and unwelcome assimilation, "sends a message of pluralism and freedom to choose one's own beliefs." *Allegheny*, 492 U.S. at 634 (O'Connor, J., concurring in part).

The test we propose thus bridges the gap between the endorsement and coercion standards, while clarifying the meaning of the effects prong of *Lemon*.

* * *

The *Lemon* test in its current form distracts the courts with slogans and labels and diverts them from the real interests at stake in Establishment Clause cases. This case exemplifies how the test can be misused to invalidate a legislature's effort to respond to the distinctive needs of a religious minority without promoting religion or unduly burdening other citizens. We urge the Court to reverse the decision of the Court of Appeals and at the same time set forth clear principles for accommodation of religion that respect and promote the overriding value of religious liberty.

Respectfully submitted,

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APPENDIX

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 5,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center For Law And Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the accommodation of religious exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-

negotiable prohibition attached to this, our First Freedom: "Congress shall make no law. . . . "

The National Association of Evangelicals is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Southern Center for Law & Ethics is a nonprofit publicly funded, tax-exempt corporation founded in January 1985 and based in Birmingham, Alabama. Policies are set by a board of directors consisting of four attorneys and six laymen. Paramount to the Center's purpose is to develop an understanding of how to integrate a world and life philosophy with law and social ethics. The Center's activities include interaction with interested law students, lawyers, and members of the academic community, publication of articles and a journal of theology and law, and providing legal counsel and filing *amicus curiae* briefs on a variety of public issues, from the free speech rights of college professors to the legal status of midwives, related to the Center's purpose.

The Center is interested in fostering fair treatment of religion and religious communities and individuals. The Center is concerned that religious communities and individuals have the right both to participate in public life within society, and to withdraw from such public life, as

determined by the beliefs and wishes of those communities and individuals. The Center believes that governmental actions to accommodate the religious practices and beliefs of specific communities and individuals fosters religious liberty *and* religious toleration.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.
